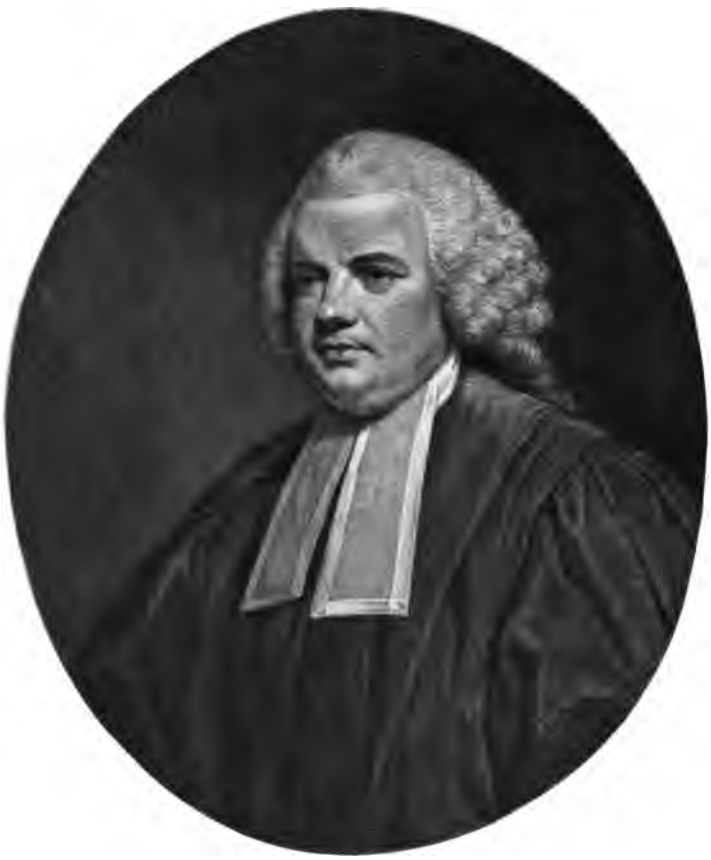
JSN
JAD
XXH



JOHN DUNNING,

(LORD ASHBURTON)

From an engraving by F. Bartolozzi, after a portrait by Sir Joshua Reynolds.

[redacted]

JOHN DUNNING.

REPORTS OF CASES

Argued and Adjudged

IN THE

COURT OF KING'S BENCH

IN THE LATTER PART OF THE

REIGN OF GEORGE THE SECOND.

By JOHN DUNNING,

LORD ASHBURTON.

With Notes of Reference to English and American Cases,

By CHARLES G. DELANO,

OF THE MASSACHUSETTS BAR.

BOSTON:

PUBLISHED BY GEORGE B. REED.

1885.

University Press:
JOHN WILSON AND SON, CAMBRIDGE, MASS.

PUBLISHER'S NOTICE.

CHARLES G. DELANO, Esq., a lawyer residing at Northampton, Massachusetts, during a short stay in a western State in the summer of 1884, discovered, in an interleaved copy of the first edition of "Sayer's Reports," manuscript copies of the cases given in this volume, each signed "D. Ld. A."

In a letter to me, Mr. Delano says: —

"I have recently had access to a valuable manuscript of select cases in the time of George the Second, by Dunning, Lord Ashburton, the celebrated English advocate. They are authentic, and very excellent specimens of the art of the reporter. The cases appear in 'Sayer's Reports,' but are there very imperfectly reported."

BOSTON, MASS., May, 1885.

Three of the Cases given in this volume appear in "Kenyon's Reports."

JOHN DUNNING.[1]

"I AM not afraid of offending a most learned body, and most jealous of its reputation for that learning, when I say that he is the first of his profession. It is a point settled by those who settle everything else; and I must add (what I am enabled to say from my own long and close observation), that there is not a man of any profession, or in any situation, of a more erect and independent spirit, of a more proud honor, a more manly mind, a more firm and determined integrity." — EDMUND BURKE.

"JOHN DUNNING, a name to which no title could add lustre, possessed professional talents which may truly be called inimitable; for, besides their superlative excellence, they were peculiarly his own; and as it would scarcely be possible to copy them, so it is hardly probable that nature or education will give them to another. His language was always pure, always elegant, and the best words dropped easily from his lips into the best places with a fluency at all times astonishing. . . . That faculty, however, in which no mortal ever surpassed him, and which all found irresistible, was his wit. . . . He was endowed with an intellect sedate yet penetrating, chaste yet

[1] Mr. Dunning was born in 1731, admitted to the practice of the law at the age of twenty-five (at which time the reports of the cases now published must have been taken by him), was appointed Solicitor-General in 1768, advanced to the Peerage in 1782, and died in 1783. His fame as a lawyer extended to the Colonies. In an early Massachusetts case the court pay him an unusual tribute of respect, refusing to contest a point which, in a case before Lord Mansfield, had been conceded by Dunning. He was the counsel selected by Franklin to urge the petition of the Government of Massachusetts for the removal of Hutchinson.

profound, subtle yet strong. His knowledge, too, was equal to his imagination, and his memory to his knowledge. He was no less deeply learned in the sublime principles of jurisprudence and the particular laws of his country, than accurately skilled in the minute but useful practice of our different courts. . . . As a lawyer, he knew that Britain could only be governed happily on the principles of her Constitution or public laws; that the regal power was limited, and popular rights ascertained by it; he was therefore an equal supporter of just prerogative and of national freedom, weighing both in the noble balance of our recorded Constitution. . . . His sense of honor was lofty and heroic; his integrity stern and inflexible; and though he had a strong inclination for splendor of life, with a taste for all the elegancies of society, yet no love of dignity, of wealth, or of pleasure could have tempted him to deviate, in a single instance, from the straight line of truth and honesty." — SIR WILLIAM JONES.

LORD MANSFIELD AND MR. DUNNING.

MR. DUNNING having resigned his office of Solicitor-General, appeared on Wednesday, 2d May, 1770, being the first day of Easter Term, 10 Geo. 3, on the outside of the bar in the common ordinary bar gown. Lord Mansfield, after Mr. Dunning had made his first motion, addressed himself to him, and declared that in consideration of the office he had held, and his high rank in business, he intended for the future (and thought he should not thereby injure any gentleman at the bar) to call on him next after the King's Counsel, Serjeants, and the Recorder of London.

Mr. Caldecott and Mr. Coxe, the two senior utter Barristers present, very readily assented to it, and said that they had thoughts of proposing the same thing themselves.

(5 *Burr.* 2568.)

TABLE OF CASES REPORTED.

CASES CITED IN THE NOTES.

English.

American.

CASES

Argued and Adjudged

IN THE

COURT OF KING'S BENCH.

1753, 1754.

Court of King's Bench.

Trinity Term.

27 Geo. 2, 1753.

SIR WILLIAM LEE . . . *Chief Juſtice.*

SIR MARTIN WRIGHT,
SIR THOMAS DENISON,
SIR MICHAEL FOSTER, } *Juſtices.*

CASES.

Trinity Term.

27 Geo. 2.

1753.

REX
v.
INHABITANTS
OF
STEYNING.

Rex *verſ.* The Inhabitants of Steyning.

The Court will not give leave to file an Information for not repairing a Highway; the remedy is by Indictment, or Preſentment at Seſſions.

UPON a motion of Mr. Hume for an Information againſt the Defendant, for not repairing a Highway (which the Affidavits called the King's way) in the Pariſh of Steyning, in Suſſex it appeared, that the Highway was out of Repair; that the Pariſhioners had repaired it; and that two Bills of Indictment for not repairing it, which had been preferred to two Grand Juries, had been found no true Bills: (that the Pariſh Officers promiſed it ſhould be repaired). But it likewiſe appeared, that the Highway was only about One Hundred Yards in Length; and that another Highway in the Town of Steyning, near this and ſo little a way as to be almoſt equally convenient to the Public, was in good Repair.

1753.
REX
v.
INHABITANTS
OF
STEYNING.

Per R. Lloyd, *s.c.* It is not ſworn to be a *Highway.* It ought alſo to be ſworn to have been uſually repaired by the Pariſh. I have Affidavit by one of Grand Jury ſhewing that it did not appear to them that it was repaired by the Pariſh. It is only ſworn to have been repaired by the Pariſhioners; & this our Affidavits explain, by ſhewing this to have been done by people, who had fields adjoining, & who in Hay time did it for their own convenience.

WRIGHT, J. was of Opinion that a Rule to ſhew Cauſe ought to be made; for that all Highways ought to be kept in Repair. It is indeed ſworn to be uſeleſs: but the nature of the King's Highway (between which & a King's way I know no difference) beſpeaks the contrary. The Grand Juryman ſwears there was not ſufficient evidence of its being a Highway; but that's a matter which they are not to determine.

The other three Juſtices being of contrary Opinion, no rule was made.

And by them —

LEE, Ch. J. & his Court, in particular Deniſon, J. Wherever this Court has interpoſed there has been 1. A manifeſt Highway. 2. Great inconvenience from the want of the repair. 3. A defect of Juſtice below.

FOSTER, J. The Court has interpoſed in this manner in one or two Caſes: for my part I have never thought it right to interpoſe at all, much leſs in a Caſe like this, becauſe the Legiſlature have provided a proper remedy by divers Acts of Parliament. The Juſtices may preſent it at Seſ-

sions. The fines if we impose any, are not to be estreated, but are to be laid out in the repair of the road, so that the Crown would receive no benefit from an interposition.

THE court granted an information against the inhabitants of a parish for the non-repair of a road, where it was deposed that a bill of indictment had been preferred at the assizes, but thrown out by the grand jury; that two of the grand jurors were proprietors of land in the parish; that one of them, who had acted on behalf of the parish at an earlier stage of the dispute, had stated to the foreman that the road was useless; and that both had taken an active part in opposing the finding of the indictment. Reg. *v.* Upton St. Leonard's, 10 Q. B. 827.

By 5 & 6 Wm. 4, c. 50, s. 96, the proceeding by presentment of justices was abolished.

Reg. *v.* Mawgan in Meneage, 8 A. & E. 496.
Reg. *v.* Denton, 18 Q. B. 761.

In a very recent case, The Queen *v.* Labouchere, 12 Q. B. D. 330, the principle on which the court will grant an information, was cited with approval, as thus laid down by Blackstone:

"The objects of the other species of informations, filed by the master of the crown office, upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion." B. iv. c. 23, p. 309.

The rule as restricted by Foster, J., in the principal case, was recognized in an early American authority, and it was said, "that all public misdemeanors may be prosecuted in behalf of the crown or commonwealth unless the prosecution be restricted by the statute to indictment."

Com. *v.* Waterborough, 5 Mass. 257.
Bish. Cr. Proc., vol. i. s. 607.

Michaelmas Term.

27 Geo. 2.

1753.

REX
v.
BOYCE.

Rex *verſ.* Boyce.

Motion to quaſh. When denied.

PER CURIAM. We never quaſh Indictments for Nuſances, for Forgery, for Murder, or for diſobeying Juſtices' Orders. You may demur or move in arreſt of Judgment, but we ſhall not encourage a contempt of Orders.

THE court will, as a general rule, refuse, if the application is upon the part of the defendant, to quash an indictment for felony, Rex *v.* Johnson, 1 Wils. 325; so an indictment for any of the following misdemeanors: cheating, Rex *v.* Orbell, 6 Mod. 42; Rex *v.* Crookes, 3 Burr. 1141; extortion, Rex *v.* Wadsworth, 5 Mod. 13; nuisances, Rex *v.* Belton, 1 Salk. 372; for not obeying a magistrate's warrant, Rex *v.* Bailey, 2 Str. 1211.

But where it clearly appears that an indictment has been found without jurisdiction it will be quashed.

Rex *v.* Bainton, 2 Str. 1088.
Rex *v.* Heane, 4 B. & S. 947.
Com. *v.* Eastman, 1 Cush. (Mass.) 189.

Thus an indictment for perjury or forgery found at the sessions.

Indictments have been quashed where the facts stated did not amount to an indictable offence.

Rex *v.* Sermon, 1 Burr. 516.
Rex *v.* Philpotts, 1 C. & K. 112.
Rex *v.* James, 12 Cox C. C. 177.

The motion to quash is addressed to the discretion of the court, and may be made at any time before verdict.

Steph. Cr. Proc., art. 257.
Arch. Cr. Pl. & Ev. (18th ed.) 94.

Hilary Term.

27 Geo. 2.

1754.

REX
v.
BLOWER.

Rex *verſ.* Blower.

The Venue of an Offence is well laid in the Pariſh though it contain two or more Vills, but under the Statute of Additions the Defendant ſhould be deſcribed of the Vill or Hamlet.

IN an Indictment for a Nuſance the Defendant was alledged to be of the Pariſh of Shepey, Great Cheney, Yeoman; and the Nuſance was alledged to be in a Highway in the Pariſh of Shepey at Great Cheney aforeſaid.

The Defendant pleaded in Abatement, that there are four Vills in the Pariſh of Shepey; and that it is not ſhewn in which of the Vills the Highway is.

Upon a Demurrer to this Plea, it was holden to be bad; and Judgment of *Reſpondeas Ouſter* was given.

Poole, Serjeant, for Defendant inſiſted, that the Venue ought to be laid in a Vill and not in the Pariſh.

Hewitt, for Proſecutor. On an Indictment it might be as well laid in a Pariſh as in a Town, though it would be otherwiſe in an Appeal on the Statute of Glouceſter, which had been held to require it to be lain in a Town. Lord Coke in his reading on the Statute of Glouceſter requires this particularity in an Appeal on the Statute of

1754.
REX
v.
BLOWER.

Glouceſter; it cannot ſays he be lain in a pariſh for the Statute requires it to be lain in a Town, and Serjeant Hawkins ſays in a count on an Appeal the Town is proper to be lain becauſe the Statute of Glouceſter requires it. Co. Lit. 125 ſhews that a venue may be from a pariſh. And as to *Arundel's Caſe* 6 Co. 14. it is not applicable. It was laid in the Indictment in a pariſh within the City of Weſtminſter, and therefore as the Venue was from the city at large it was a Mis-trial for it did not conform to the place laid in the Declaration, and the venue ſhall neither be greater nor leſs than what appears on the Record. 2 Ro. Abr. 626. pl. 26. Plea in Abatement. 11 Co. 26. *Sir H. Harpur's Caſe:* the reaſon there too was that the verdict did not correſpond to the Record. But the place laid here in Great Cheney & a venue from thence will be right. I apprehend therefore none of thoſe caſes are applicable. Mr. Serjeant has produced no caſe where a plea of this ſort has been pleaded, ſo I preſume there is none. Were the plea to be allowed it would be of the moſt miſchievous conſequences, for there is ſcarce an Indictment drawn but will be liable to be overturned by this Exception.

The Statute has taken it away in reſpect of civil actions, but it remains, Mr Serjeant ſays in Indictments &c. Lord Holt ſays the Hundred is the neighborhood: ſurely the pariſh is ſo.

WRIGHT, J. The Defendant here is ſtiled in this Indictment of the Pariſh of *Great Cheney*, Yeoman: but the Statute of Additions expreſſly requires he ſhall be named of *the Vill.* On that

1754.
REX
v.
BLOWER.

account therefore you might have pleaded in Abatement. You have cited no caſe of a plea like the preſent; that of Appeals, as Mr. Hewitt has obſerved does depend on the Statute of Glouceſter.

DENISON, J. This plea is a very new one. I do not remember a precedent of the kind. In my Lord Coke's Comment on the Statute of Additions, 2 Inſt. 669. it is required that a Man muſt be named of what vill he is and therefore a plea in Abatement that there are ſeveral vills in the pariſh where a Man is ſaid to be of ſuch a pariſh, praying Judgment becauſe it does not appear of what Vill he is would be good. Here the Objection is only to the Venue. I am not for encouraging Pleas of this kind, for they will be pleaded at every Aſſize and to every Indictment where the place laid is uſually the Pariſh at large, and would, as has been ſaid, be of very miſchievous conſequences. I don't know whether or no the late Statute extends to popular actions; if it does not, it is a further reaſon why we ought to lean againſt pleas of this ſort. Moſt certainly however it would have been a good plea in Abatement on the Statute of Additions.

FOSTER, J. The Caſe of Appeals does depend on the particular words of the Statute. Arundel's and Harpur's caſes do not affect this for in theſe caſes it appeared from the Indictments themſelves that the venue was wrong. No precedents of a plea like the preſent have been produced, and if none can be produced we ſhall not be for encouraging ſuch pleas.

1754.
REX v. BLOWER.

The profecutor's Counfel preffed the Court not to let it ftand over, if they had no doubts, for otherwife the Defendant would have the benefit of his plea and the Affizes will be loft.

DENISON, J. I never underftood a perfon was compellable to lay his venue in a Vill: I am fure he may by Law lay it in a Parifh.

PER CURIAM. Let there be Judgment for Defendant to anfwer over.

FORMERLY, by ftat. 1 H. 5, c. 5, if the addition of the defendant, namely, the place or hamlet, was omitted, it was matter for plea in abatement. Rex *v.* Darby, 3 Mod. 139. Cro. Jac. 610, 616.

' But now, by 14 & 15 Vict. c. 100, s. 24, no indictment shall be held insufficient for such want or imperfection, nor need the rank in life, occupation, or residence of the defendant be ftated. Steph. Dig. Cr. Proc., art. 247.

And by the foregoing ftatute, s. 23, it is no longer necessary to ftate any venue in the body of the indictment, but the county or other jurisdiction in the margin thereof shall be taken to be the venue for all facts ftated in the body of the indictment except those which require local description.

One of the cases in which this is required is that of nuisances to highways; and there it is sufficient to lay the fact to be committed *in parochia*, &c., without laying a vill.

Goring *v.* Deering, 3 Mod. 158.

The general rule of pleading in the American States is to aver the county, without more; but the common-law rule is still followed in many of the States.

Bish. Cr. Proc., vol. i. s. 93.
Com. *v.* Springfield, 7 Mass. 9.

Court of King's Bench.

Eaſter Term.

27 Geo. 2, 1754.

SIR DUDLEY RYDER . . *Chief Juſtice.*

SIR MARTIN WRIGHT,
SIR THOMAS DENISON,
SIR MICHAEL FOSTER, } *Juſtices.*

MEMORANDUM. — Sir *Dudley Ryder* took his Seat, as Chief Juſtice of this Court, the Beginning of this Term, in the Room of Sir *William Lee*, the late Chief Juſtice, who died during the Vacation, after laſt Term.

Eaſter Term.

27 Geo. 2.

1754.

REX
v.
BERKELEY &
BRAGGE.

Rex *verſ.* Berkeley & Bragge, Eſq^rs.

The right of the Crown to have a *Certiorari* iſſue in a Caſe concerning the public Revenue cannot be taken away except by the expreſs words or evident intent of a Statute. The Stat. 13 G. 2. c. 18. is a general Statute of limitations and does not extend to the King.

UPON a rule to ſhew Cauſe why a *Certiorari* ſhould not iſſue to remove an Order made by the Defendants, two Juſtices of the Peace, it appeared: that the Order was upon the Collector of Exciſe to repay ſeveral conſiderable ſums adjudged by them to have been overcharged on Meſsrs. Tyndal & C^o^ for the duties on Glaſs. A *Certiorari* had been applied for ſome time ago but not obtained; no notices having been given to the Juſtices under 13 G. 2. c. 18. Notice having been given, a *Certiorari* was applied for laſt Term: but it was found that with reſpect to ſome of the Orders intended to be removed the time was elapſed: Upon which Ryder Attorney General argued that the Crown was not bound by that Act; & that though he had complied with it in giving notice, he needed not have ſo done.

Rule to ſhew cauſe &c

RYDER, Ch. J. now delivered the opinion of the Court. This is a matter of great conſequence and in the way its now put, greatly affects the

1754.
REX
v.
BERKELEY &
BRAGGE.

Revenue by which the Nation is ſupported. The queſtion is in fact a ſingle one, but the Gentlemen have mentioned many others, which ſeem to me immaterial. Let us firſt get rid of thoſe, for though they can't clear they may entangle the Queſtion, One is, the propriety of the Juſtices' conduct; that is not now in queſtion. Another is, whether the Officers have exacted by their charge more than they ought: that is not material to the preſent queſtion which is no more than whether this Court ſhall bring up the record. Whether the Juſtices have or have not exceeded their Authority I can't think totally immaterial, for on the Act of the 13. G. 2. if they have not acted according to their Authority, that Act may be laid out of the Caſe, for it concerns ſuch Orders only as are made within their authority.

There can be no doubt but this Court, by the Common Law, has a right to bring before it all records in order, if wrong, to rectify them if rectifiable, if not, to quaſh them. This Juriſdiction is abſolutely neceſſary: without ſuch a one ſome where, the many inferior Juriſdictions would run counter to each other and ſoon be involved in confuſion. This may be done by Writ of Error, *Mandamus*, *Habeas Corpus* &c. in ſeveral Caſes. This general Juriſdiction is veſted in this Court, and this only, and has never been diſputed, though it has been often queſtioned how far particular Acts of Parliament have prevented the Exerciſe of it in particular caſes; for though records of wrong Judgments may be avoided in a Collateral way as nullities *coram non judice*, that

is not ſufficient: the Court will not permit ſuch to exiſt.

The Queſtion then comes to this whether there is any particular Act of Parliament that takes away our Juriſdiction in the preſent Caſe.

The 19. G. 2. gives this Additional Revenue and puts it under the ſame regulations with that which is the ſubject matter of the other Exciſe laws, among which are the Acts of Car. 2. and thoſe are ſaid to determine the Queſtion; for ſay the Gentlemen, under certain clauſes in theſe Acts there can be no *Certiorari*. A clear Anſwer has been given to this, and that is, that had this Clauſe been part of the preſent Act, it would not have prevented the iſſuing a *Certiorari*, for it only prevents its being a *Superſedeas*, not its iſſuing. That it ſhall not ſuperſede implies it may iſſue. They conſider not ſuperſeding and not iſſuing as the ſame thing; but it is not ſo by any means.

A Writ of Error, though no *ſuperſedeas*, is nevertheleſs a good Writ of Error, on which Judgment may be reverſed. As to what is ſaid of theſe Orders being final, it means only that there ſhall be no Appeal, not that this Court ſhall not ſee whether or no they are right, on the face of them.

Let us next conſider whether or no the Crown is included in 13. G. 2. 'Tis agreed that the King's prerogative is not taken away but where he is named, but with ſome few Exceptions. It has been laid down that the King is not within the words Party & Party: that is not abſolutely

1754.
REX
v.
BERKELEY &
BRAGGE.

denied, but they ſay there have been caſes where the Crown has been included though not named, and in Magdalen College Caſe, there is ſome ſort of Rule laid down. I think it however impoſſible to make any general rule in thoſe Caſes, unleſs it be this, that if it appears from the whole or any part of an Act, that the Legiſlature meant to include the Crown, it ſhall be included and not otherwiſe.

Apply that Rule to the preſent Caſe: the Occaſion and end of that Act is to prevent vexatious delays and expences. The Law it has been admitted is too decent to ſuppoſe the Crown can be guilty of any thing of that ſort: and yet this Act being a remedial one, ſuppoſes that to have been done which it means to prevent in the future; it plainly relates to that kind of delay only which uſually happens between ſubject and ſubject. Another thing, this Act requires that it ſhall be duly proved on Oath that the party or parties ſuing forth the ſame, hath given notice &c. to the end that they or the parties may ſhew cauſe. No ſtranger unacquainted with the Law, would think the Crown concerned in theſe words. There is no inſtance produced where ſuch words have been held to include the Crown, many to the contrary. It has been ſaid that other words like theſe, have been ſo conſtrued. Magdalen College Caſe is founded upon the particular circumſtances of that Act.

Were what is contended for to be eſtabliſhed, it would be out of the power of the Crown to redreſs any injuries it may receive from the negligence of

1754.
REX
v.
BERKELEY &
BRAGGE.

its Officers: and if a retroſpect like the preſent be allowed, a much greater miſchief will be the conſequence.

But ſay they, this is not a Crown caſe: and here a diſtinction is ſet up which I never heard of before between the King in his private and in his publick capacity.

That where the King is concerned in his public capacity he is not entitled to this Prerogative: but it will be found on examination that the King's perſon and Intereſt are guarded by his Prerogative, for no other reaſon but that he is a publick perſon and his Revenue publick; by which the Honor of the Crown and the Intereſts of the Publick are to be ſupported.

Another Objection was that this is not a matter of Prerogative, for that the Prerogative of the Crown extends only to the Intereſts of the Crown ariſing from the Common law and therefore as this was no part of the Antient Revenue of the Crown, but given by Act of Parliament, the Prerogative would not extend to it. But I take it to be a general Prerogative that the King ſhall not be bound unleſs named.

Beſides the 13. G. 2. cannot be taken to extend beyond thoſe Orders that are within the Juriſdiction of the Juſtices of the Peace: and if this Order be not within the Juriſdiction, that Act does not affect it. Now this does not ſeem to be within their Juriſdiction, for the Clauſe on which their authority is founded, only authorizes them to acquit and diſcharge, not to direct a reſtitution. Therefore it appears they have gone further back

1754.
REX v. BERKELEY & BRAGGE.

than they ought, they can have no Juriſdiction, and we have no other method of ſeeing whether they have done ſo or not, but by *Certiorari*.

WRIGHT, J. It appears pretty clearly that this is a Crown Caſe, not only from the Attorney General's avowing it to be ſuch, but from the form and purport of the Summons to the Collector &c. as Officers of the Crown. So too by the reaſons given on the other ſide, it appears to be underſtood ſo. The Objection is that this is a Revenue appropriated not to the King but to the Publick: 'Tis to the King for the uſe of the Publick: and the King is intitled to his Prerogative to cover this as well as any other branch of his Revenue. There can be no doubt but the King has a right, an Inherent Common Law right, an antecedent right to have a *Certiorari*. If ſo it can't be taken from him but by Act of Parliament. Has there been any Act of Parliament which has done this?

Its proved by the St. 12 Car. 2. not that no *Certiorari* ſhall iſſue, but that it ſhan't ſuperſede, which is vaſtly different.

Writs of Certiorari it was rightly ſaid by Mr Yates are in nature of Writs of Error, and they are good, though they don't ſuperſede.

There is no other Statute then but that of the 13. G. 2. and it ſeems admitted and muſt be ſo, that no antecedent right or prerogative can be taken away, but by the expreſs words or the evident meaning of an Act of Parliament. Only one Caſe has been mentioned to the contrary and that was on the Statute of Additions which Mr Attorney rightly excepted by obſerving that the

1754.
REX
v.
BERKELEY & BRAGGE.

queſtion was about Indictments which are at the King's ſuit only, ſo that he was virtually, though not nominally included.

Certain it is he is not named in this Act, nor was he ever held to be meant by the word Party — Juſtice Powell's was not a Dictum but part of his Argument. I think Farwell's caſe notwithſtanding the diſtinction between an Indictment & an Order is a Caſe in point, for though the Prerogative of trying where he pleaſes fails here, that of removing to examine holds.

DENISON, J. The queſtion is a ſingle one, (for there can't be a ſtronger caſe to ſhew that the King and his Revenue are immediately concerned) and that is whether there is any Law reſtraining this Court from granting a *Certiorari.*

The Limitation of time in the Act 13. G. 2. has introduced the queſtion whether the General Words of it do not affect the Crown. I take this to be a Statute of Limitations and the King is not within any other Statute of Limitations for no laches ſhall be imputed to him where he ſlips the time that binds the Subject. By the St. Weſtminſter 2. c. 6. Plea 6 Months is a good Plea in a *Quare impedit* but not againſt the King, Plowden 236. becauſe ſo ſays Lord Coke in *Magdalen College caſe;* but Bro. title Prerog. pl. 76. gives another reaſon I like much better and that is, that laches ſhall not be imputed to the King on Account of his prerogative. Why then ſhould the King be out of all the other Statutes of Limitations and yet be in this. For this additional

1754.
REX v. BERKELEY & BRAGGE.

reaſon as well as the others mentioned by my brothers, I think the *Certiorari* ought to go.

FOSTER, J. Its the undoubted Prerogative of the Crown to ſee that all inferior Juriſdictions are kept within their proper bounds, and on that principle the whole Doctrine of *Certiorari* proceeds. I think the Act of the 13. G. 2 being to prevent vexation and delay, which are not to be ſuppoſed in the Crown, does not reſtrain this prerogative. This is undoubtedly a Crown caſe and Mr Attorney General moves it as ſuch.

Rule abſolute.

THE writ of *certiorari* under the present English practice is a writ whereby the High Court of Justice (Queen's Bench Division) may order any proceeding to be removed from an inferior court and to be determined before itself or otherwise.

Steph. Cr. Proc., art. 89.

The writ is demandable as of right by the crown, R. *v.* Eaton, 2 T. R. 89; and issues as of course when the Attorney General or other officer of the crown applies for it, either as prosecutor or as conducting the defence on behalf of the crown. Ib.

Rex *v.* Lewis, 4 Burr. 2458.
Arch. Cr. Pl. & Pr. (18th ed.), p. 99.

The writ will not issue at the instance of a private prosecutor or the defendant, unless it is made to appear by affidavit that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view or special jury may be required.

16 & 17 Vict. c. 30, s. 4.
Steph. Cr. Proc., art. 91.

The application for the writ may be *ex parte*, and should be made before verdict. Rex *v.* Garside, 2 A. & E. 266.
But see Rex *v.* Seton, 7 T. R. 369.
Reg. *v.* Bothel, 6 Mod. 17.

The crown cannot be divested of this prerogative or right to *certiorari* by the general words of an act of Parliament, or unless expressly named. Rex *v.* Armagh, 8 Mod. 8.
Rex *v.* Reeve, 1 W. Bl. 231.
Rex *v.* Tindal, 15 East, 339, n.
Ledsam *v.* Russell, 1 H. L. C. 697.

The prerogative of the crown to remove into the Court of Exchequer a cause which concerns its revenue is unaffected by the county court acts. Mountjoy *v.* Wood, 1 H. & N. 58.

The doctrine that the crown is not barred by lapse of time is qualified only in a few recent instances where the statute has in express terms been extended to the crown.

Thus the general Statute of Limitations, 21 Jac. c. 16, s. 3, does not bind the sovereign; but he is within the provisions of 32 Geo. 3, c. 58, 9 Geo. 3, c. 16, 7 Wm. 3, c. 3, and 11 Vict. c. 12.

If a right of presentation to a benefice lapses to the crown, the patron shall not recover his right until the former has presented; but it is otherwise if the patron should present and the incumbent dies before *quare impedit* brought by the King.

Storie *v.* Bishop of Winchester, 9 C. B. 90; s. c. 17 C. B. 653.

In American practice a writ of *certiorari* usually issues after judgment. 12 Am. Dec. 531, n.

It is a discretionary writ, except when applied for by the State. Lees *v.* Childs, 17 Mass. 352.
Munro *v.* Baker, 6 Cow. 396.

And it is generally true that where the party can obtain redress by appeal or writ of error, it will not be granted.
Savage *v.* Gulliver, 4 Mass. 178.

It lies to review all questions of jurisdiction, but not to review errors in the proceedings where there is another remedy.

Hayward, Petitioner, *Ex parte* Haywood, 10 Pick. (Mass.) 358.
Farmington River W. P. Co. *v.* County Comrs., 112 Mass. 206.

Its principal use is to supervise the proceedings of those judicial tribunals whose procedure is not according to the course of the common law.

Parks *v.* City of Boston, 8 Pick. (Mass.) 218.
Mendon *v.* County Commissioners, 2 Allen (Mass.), 463.
Locke *v.* Selectmen of Lexington, 122 Mass. 290.

1754.

REX
v.
DEBORAH
BURGESS.

Rex *verſ.* Deborah Burgeſs.

A writ of *Certiorari* will iſſue as of right on the ſuggeſtion of the Crown of its intereſt either as proſecutor or defendant.

UPON a Motion by the Attorney General for a *Certiorari* to remove an Indictment it appeared: that the Indictment was for ſhutting and locking up one of the Gates of Richmond Park, and that it was found at an Aſſiſe in the County of Surry.

Gould. I make no doubt but this is moved, as Mr Attorney ſays, by the ſpecial Command of his Majeſty: but as Counſel for the King or Proſecutor, I muſt object to the Motion.

1ſt. That by all the Statutes particularly that of the 3 & 4 W. & M. c. 12. its directed that all matters concerning Indictments of Highways ſhall be tried in their proper Counties and no *Certiorari* awarded unleſs an Affidavit is made that ſome right of freehold comes in queſtion and then a Recognizance is directed.

2nd. This is an Indictment found at the Aſſiſes and I apprehend it a known Rule never to grant a *Certiorari* at the prayer of the Defendant becauſe one of the Judges goes there.

Mr Attorney. If I pleaſed I might ſtop or conduct this Indictment; but as its a civil right which is in queſtion, his Majeſty chooſes to have that right tried here, and I move it by his Order. — The Acts alluded to relate to Indictments for not repairing Highways, & not for ſtopping them.

RYDER, C. J. This is an uncommon Caſe. The matter in diſpute is his Majeſty's private right to Richmond Park: private I call it (though his Maj-

1754.
REX
v.
DEBORAH
BURGESS.

eſty is intitled to it in right of his Crown) in oppoſition to that publick right which makes him proſecutor.

The Counſel contending appear one on behalf of the Crown in virtue of his right to the Eſtate; the other for the Crown in its publick capacity. Right of Freehold is agreed to be a general Exception to the general prohibition of *Certioraris*, and on ſtating this Caſe there appears to be ſuch a right in queſtion. Whether theſe Acts relate to obſtructions of Highways, or not, I know not.

Gould. The words are "All Indictments upon that Act," and nuſances are mentioned before.

Ch. J. But to go further, the Law is general that the King may remove his cauſe as he pleaſes. And I think though the name of the Crown did not appear in it, he might remove it on a ſuggeſtion that his intereſt was concerned if he thought ſo.

Mr Attorney General's Application being on the part of the Defendant makes no difference, for its ſufficient if it be on behalf of the Crown.

WRIGHT, J. This motion is certainly new and I have ſome difficulties in it.

Its a motion for the Defendant, his Majeſty out of his Tenderneſs as a civil right was concerned aſſents to the Motion, but its never moved on the part of the Defendant. Let the Indictment be what it will its not a Motion of courſe for the Defendant. The Defendant applying for a *Certiorari* muſt make a ſpecial caſe.

There is an expreſs negative on the Defendant's obtaining a *Certiorari* by this Act, without an Affidavit.

1754.
REX
v.
DEBORAH
BURGESS.

DENISON, J. An Affidavit ſurely might eaſily have been had: we can't conſider that matter as appearing on the Indictment.

Mr Attorney. I might have moved this without ſaying for whom; but I thought it more candid to ſtate the circumſtances of the Caſe, as a civil right was concerned. I have however an Affidavit from the Defendant of the right.

It was accordingly read.

FOSTER, J. This appears to ſtand much in the ſame circumſtances as the Briſtol caſe for there the King was not a party to the Record, but he appeared to be intereſted in the diſpute. And I take it to be a General rule wherever the King's right appears to be concerned, he may without a ſpecial Order have it tried where he pleaſes.

About 44 years ago the *Queen* v. *Alderton* was an Indictment for an affray within the verge of the Palace; a *Certiorari* removed it hither; but the Attorney General came in and made his Election on the part of the Crown to proceed there, and a *procedendo* was granted.

WRIGHT, J. I only doubted on account of its being moved as a matter of courſe.— If the Crown's Intereſt is concerned no doubt that's a ſufficient reaſon: and it now appears to be ſo by the Affidavit. *Certiorari granted.*

THE High Court (Queen's Bench Division) will not in general, at the prayer of the defendant, except when the interest of the crown appears, remove an indictment from a court of competent jurisdiction at which any of the judges preside.

Rex *v.* Wartnaby, 2 A. & E. 435.
Rex *v.* Templar, 1 Nev. & P. 91.

Rex *verſ.* Goodhall.

1754.
REX
v.
GOODHALL.

PERROT. Exception, — It does not appear that Defendant has been committed by any proper Authority. The Mayor, if he be a Juſtice of the Peace, ought to have been ſo ſtiled. Whether he is ſo in fact I know not; If he be, the Court will not take Judicial Notice of it.

A Warrant of commitment for Felony need not ſhew the Authority of the perſon who grants it.

Hume *s.s.* The practice will not admit of Affidavits as to the Guilt or innocence of the party: but this Court may undoubtedly Bail even in Capital Caſes. Two things are neceſſary to be ſhewn on a *Habeas Corpus* to ſupport the Commitment. One is, ſuch an Offence as will warrant it: the other is, that the perſon committing had legal Authority to take the Charge on Oath and commit in conſequence of it. Secretaries of State are Conſervators of the Peace at Common Law and on that account their Commitments have been ſupported, but the Court will not take Judicial Notice who are Juſtices of the Peace. It has been determined that this Court will not take Judicial Notice who are Juſtices of C. B., nay in one inſtance that Sir W. Chapple was a Judge of this Court. The Mayor (*qua* M.) has, by the Act 1. G. 1. a right to ſeize Offenders he ſees, but nothing further.

Lloyd, Solicitor General, *contra*.

The Crime for which Defendant was committed is Felony without benefit of Clergy, and not bail

1754.
REX
v.
GOODHALL.

able in the Common way, though to be ſure this Court can bail in the higheſt caſes. The queſtion made is, whether its neceſſary for the Perſon committing to ſhew his Authority. They would have the Court take it for granted that the Mayor is not a Juſtice of the Peace, but I apprehend the contrary is rather to be preſumed.

Perrot. The Court will not preſume the Mayor a Juſtice: There are many Corporations where Mayors are not ſo. If this is ſo, it muſt be by Charter & its well known the Court never takes Judicial Notice of Charters of Corporations. They muſt bring them in and enroll them, or the Court can take no notice of them. The Court will preſume nothing againſt Liberty.

FOSTER, J. I remember this Exception taken to a Commitment of the Lord Mayor of London on the Statutes of forcible entry and it was overruled.

Hume. This Court takes Judicial notice of many things in reſpect of the city of London which it does not in the Caſe of other Corporations.

The Court choſe to take time to conſider and week after delivered their Opinion when

WRIGHT, J. Cited a Caſe of the *King* v. *Mary Talbot* M. 4. G. 2. She was apprehended on a privy ſearch in a diſorderly houſe. It was objected that the perſon granting the Warrant, did not appear to be a Juſtice of the Peace; but it was overruled for that it was a Warrant of Commitment and not a Conviction.

RYDER, C. J. If theſe niceties were to be re-

1754.
REX
v.
GOODHALL.

quired, it would deſtroy a multitude of Commitments. Its neceſſary in all Judgments &c. the Juriſdiction ſhould appear; but that's a different matter.

Commitments are for no other purpoſe than to bring a Criminal to a legal Trial.

Mr Nares has mentioned a Caſe where he ſays Mayor was held to be ſufficient without Juſtice but that's another point; and on this it will not be neceſſary to give him the time he aſks to look into it. Reaſon warrants this Commitment, for anybody might arreſt a Felon and carry him to Gaol without any Warrant at all.

DENISON, J. The nature of the Offence is the only thing to be conſidered here.

FOSTER, J. The Caſe I mentioned from my Memory was not, I find, applicable to this queſtion.

C. J. Let him be remanded.

LAYTON'S case, 11 Mod. 45, 46, is the one referred to in the judgment of Foster, J., and was decided under the stat. H. 6, c. 26, by which all mayors are made justices of the peace. 6 Mod. 75, would have been more to the point. No case, however, decides that the warrant of a magistrate must not show a legal authority to commit, except where the nature of the offence is such as to authorize arrest without a warrant.

Rex *v.* Kendal, Holt, 144, 145.
Rex *v.* Carter, W. Kely. 98.
Bla. Com. B. iv. c. 21, p. 292.
Com. *v.* Ward, 4 Mass. 497.
Gurney *v.* Tufts, 37 Me. 130.

A peace officer, or any private person, can always arrest and detain without a warrant a person committing, or about to com-

1754.

REX v. GOODHALL.

mit, a felony, or whom he reasonably suspects (see 3 H. & N. 417) of having committed a felony; but, as a general rule, he cannot arrest without warrant a person not charged with felony. He may, however, arrest for a misdemeanor involving an affray or breach of the peace, which continues to the time of the arrest or is about to be renewed.

Steph. Cr. Proc., arts. 96, 98.
Codd *v.* Cabe, 1 Ex. D. 355.
Com. *v.* Casey, 12 Cush. 246.
Phillips *v.* Trull, 11 Johns. 486.

If any person except an officer arrest on reasonable suspicion of a felony which has not in fact been committed, he will be liable for false imprisonment.

Stonehouse *v.* Elliott, 6 T. R. 315.
Allen *v.* Lond. & So. West. R. Co., 40 L. J. (Q. B.) 55.

1754.
REX
v.
PADDON.

Rex *verſ.* Paddon.

Motion to releaſe after Commitment a perſon unable to pay Fine.

PRICE moved for a rule to ſhew Cauſe why Defendant ſhould not be diſcharged out of the Cuſtody of the Sheriff of Devonſhire on payment of a ſmall fine.

He had been in priſon 4 years on a Conviction for keeping a diſorderly Houſe, and was too poor to remove himſelf hither by *Habeas Corpus* to receive the Judgment of the Court.

Two caſes of the like kind were cited, one was the *King* v. *Edmond* H. 26. G. 2. Defendant had been convicted on an Indictment for a Riot & carrying away one Ann Lewis; and he was diſcharged from Glamorgan Gaol in the like circumſtances — the other was the *King* v. *Davis* H. 25. G. 2. both on Mr Ford's Motion.

Rule &c.

THERE are in most of the American States statutes by force of which the court will, after a time, set the prisoner at liberty, if he is unable to make the payment adjudged against him.

Strafford *v.* Jackson, 14 N. H. 16.

But it has been held (Luckey *v.* The State, 14 Tex. 400; Bish. Cr. Proc., vol. i. s. 874) that in the absence of a statute the court could not discharge him.

Where an excessive fine is imposed by miscalculation, the court will grant a rule to amend the record of the proceedings as to so much of the punishment, but they will not disturb the judgment and verdict. Rex *v.* Stevens, 3 Smith, 366.

Trinity Term.

27 Geo. 2.

1754.

REX
v.
BRISTOW.

Rex *verſ.* Briſtow.

Juriſdiction given by Statute to the "King's Courts" excludes, *ex vi termini*, that of the Seſſions. A Motion to quaſh muſt be for a defect apparent on the face of the Indictment.

UPON a motion by Serjeant Poole to quaſh an Indictment found at the Quarter Seſſions it appeared that the Charge in the Indictment was that the Defendant acted as Bailiff in the Borough of Haſlemere without having taken the Oath of Allegiance, and without having received the Sacrament within the ſpace of ſix months. As a Ground for quaſhing the Indictment it was ſaid, that a Court of Quarter Seſſions has not a Juriſdiction in ſuch Caſe.

By 25 Car. 2. c. 5. 5. Every perſon neglecting or refuſing &c. & being thereof lawfully convicted in or upon any Information, Preſentment or Indictment in any of the King's Courts at Weſtminſter or at the Aſſiſes "ſhall be diſabled to ſue &c. or to be Guardian of any child, to be Executor or Adminiſtrator, to be capable of any Legacy or Deed of Gift or to bear any office and ſhall forfeit 500l. to be recovered by whoever will ſue by Action of Debt &c. in any of the King's Courts at Weſtminſter." The 1. G. 1 St. 2 c. 13 s. 8. as far as relates to England is in the ſame words. They are proceeding to convict the Defendant in order

1754.
REX
v.
BRISTOW.

to lay a foundation for an Action for the forfeiture. But they have miſtaken the method of proceeding which is confined to the Courts at *Weſtminſter* and the Aſſiſes: The King's Courts generally without the expreſs words "at Weſtminſter" would be conſtrued to mean thoſe Courts only and not extend to the Seſſions.

Gregory's Caſe 6. Co. 19. Moore *v.* Anderſon M. 8. G. 2. to which Mr Burrell *s.s* added Cro. Eliz. 737. Cro. Cha. 146. 1 Salk 170. 178. and the St. 21 Jac. c. 4. s. 1. which he called a Legiſlative authority to the ſame purpoſe. A ſecond Objection to the proceedings was mentioned, viz that by the laſt Seſſions of the laſt Parliament, a further time was given to take the Oaths and receive the Sacrament, with the Terms of which Defendant had complied. So that proceedings muſt be ſtayed, if the Court ſhould refuſe to quaſh the Indictment on the firſt Objection.

CH. J. Take a rule to ſhew cauſe, but you'll make nothing of the ſecond Objection, as it does not appear on the Indictment.

No cauſe being ſhewn the Rule was afterwards made abſolute.

1754.
REX
v.
BOYCE.

Rex *verſ.* Boyce.

An Indictment lies for diſobedience to an Order of Seſſions in not paying Coſts of an Appeal to a poor's Rate, and it is ſufficient to ſet out the Order either *in haec verba*, or in ſubſtance, without the previous proceedings.

INDICTMENT for diſobeying an Order of Seſſions. It conſiſted of three Counts, in ſubſtance as follows. 1ſt. The Jurors on their Oath preſent that at the Seſſions holden for the Liberty of St. Albans — 16th July, 26 G. 2. before &c. Juſtices &c. it was Ordered by the ſaid Juſtices and the Court as follows (that is to ſay) Whereas the Reverend John Boyce, Clerk Vicar of Redbourne did appeal from a Rate for the Relief of the Poor of the ſaid Pariſh, for that the ſaid Rate was unequal, Now upon hearing the ſaid John Boyce and the Overſeers &c. this Court is of Opinion and doth direct the ſame to be confirmed and the ſame is confirmed accordingly, and that the ſaid Appeal be diſmiſſed and it is ſo and for that the ſaid Appeal appears to be frivolous, the Court doth Order the ſaid John Boyce to pay 20s. Coſts, as by the ſaid Order &c. That ſaid John Boyce had notice and refuſed to pay. The ſecond Count was nearly to the ſame purpoſe. The third Count after ſetting forth the Juriſdiction ſays that on hearing a certain Appeal &c. among other things it was Ordered that ſaid John Boyce do pay to the ſaid Churchwardens and Overſeers 20s. for their Coſts, of which Notice &c.

This Indictment being removed hither, Serjeant Haywood moved to quaſh it, (*vide ante* p. 109) but the Court refuſing to quaſh it, he De-

murred and now in ſupport of his Demurrer took ſeveral exceptions:

1754.
REX
v.
BOYCE.

1ſt. That it began with, "The Jurors for our Lord the King on their Oaths preſent" and it does not appear whether it was a Jury for this Liberty or for the County at large; that this being an inferior Juriſdiction their authority ought to appear.

2d. They have not alledged that there was a Rate made, and therefore no foundation appears for their Order, and the Court will not preſume it.

3d. It does not appear of what place the Defendant is an Inhabitant. He is called Vicar of Redbourne, but it does not follow that he lives there, or has any ſubſtance there, and yet 'tis in reſpect of that only he is to be rated.

4th. It does not appear, if there was a Rate, by whom it was made or by whom ſigned or allowed. They ought to have alledged that there was a Rate made and by whom, by whom ſigned, that it was read in the Church &c. at leaſt that there was not a proper Rate. This Indictment is a recital of an Order, in which Order is a recital of an Appeal &c.

Farreſley 63. was an Indictment for an Aſſault and taking Goods from A. & B. which were taken by virtue of a Warrant &c. Exceptions 1ſt. That the property was not laid in anybody. 2. That the Judgment was not ſet forth on which the Warrant was founded. If the Court could have preſumed any thing, they would have preſumed that proper ſteps were taken before the Warrant,

1754.
REX v. BOYCE.

but they would not. So in the *Queen* v. *Hunter*. P. 13. An. an Indictment of a Conſtable for not executing a Warrant on a Conviction, becauſe only the Warrant and not the Conviction was ſet out.

The *Queen* v. *Illingſworth*, T. 13. An. Indictment for diſobeying an Order of Seſſions quaſhed becauſe the Order itſelf was inſufficient and had before been quaſhed.

The *King* v. *Burdon* P. 1. G. 1. Indictment for not taking on him the Office of Overſeer of the Poor — quaſhed becauſe it did not appear that Defendant was a proper perſon as a ſubſtantial Houſeholder.

H. 3 G. 1. The *King* v. *Holden* an Indictment for diſobeying a Juſtices' Order for payment of Servants' Wages quaſhed becauſe it did not appear that the Wages were for work done in that County.

I don't know whether your Lordſhips are bound to take judicial Notice of the days of the Week in the Almanack, if you were the demand of the Money was on a Sunday though that I don't rely on.

I don't know that any coſts were given till the Statute of King William (that of Queen Elizabeth gave none) and thoſe do not extend to the Juriſdiction. This is a hard way of trying a right: the Defendant can have no Coſts againſt the Crown.

Mr. Norton *contra*. This troubleſome fellow, to avoid the payment of 20s. for his frivolous Appeal has removed the Indictment hither, moved to quaſh it, and now demurred to it.

The ground on which they firſt applied to

1754.
REX
v.
BOYCE.

quaſh it, was, that this was not an Indictable Offence: that has not been mentioned now, and therefore I need not take any notice of it.

This is a General Demurrer and therefore all the facts ſtated in the Indictment muſt be preſumed to be true.

To be ſure the Liberty of St. Albans is an inferior Juriſdiction, and ſo is every County Seſſion in reſpect of this Court; but it was never imagined where the Juriſdiction of the Court appeared (and the Juſtices have very properly ſet out this) that the Jury were to ſet out their Authority too. That's an Anſwer to one of the Objections. Another Objection is — That the Indictment has not ſufficiently alledged the Offence, being by way of Recital: the fact is not ſo. It has ſufficiently alledged the Offence. They have ſet out the Order which is the foundation of it *in haec verba:* it has alledged expreſſly that he had notice of the Order and that he diſobeyed it. But ſays he you have not ſhewn that the perſon was liable to be rated, that the Rate was made by the Overſeers, ſigned by the Juſtices &c. All this is clearly unneceſſary; his caſes ſhew it. They ſhew that where a Judgment is ſet out its ſufficient without the meſne proceedings. The Order here is all that's neceſſary. They are now too late for theſe Objections. If the fact would have warranted it they ſhould have made them on the Appeal. The Order here is as the final Judgment, the previous ſteps were before the Court, who made the Order. If the Order had not been ſtated to be ſure it would be bad, but it

1754.
REX
v.
BOYCE.

was not neceſſary to ſet out what he mentions. I admit the principle and therefore need not take Notice of his Caſes.

The Serjeant I believe will not controvert that a diſobedience of every Order of Seſſions is an Indictable Offence, for its the only method they have of inforcing their Orders. But he ſays they have no power to give Coſts: if ſo the whole falls to the Ground. The Coſts in this inſtance are given by the 17 G. 2. and for the means of recovering them there is a reference to the 8 & 9 W. 3. c. 30. In both theſe Acts not only Counties but Ridings and *Liberties* are expreſſly mentioned, and to be ſure rightly, for the miſchief is the ſame. He ſays we might have diſtrained, but I deny it. The Statute of K. W. to which 17 G. 2. refers, gives only a power of diſtreſs where the party lives out of the Juriſdiction of the Seſſion giving coſts. Where the party lives within their Juriſdiction the Act is ſilent. Indictment therefore is their only way. 5 Mod. 179. and many other authorities are in point if the Serjeant diſputes it. It appears in this Record, the party is within the Liberty. As this is our only remedy, we notwithſtanding his Objections have properly purſued it, for we are not to ſet out that in the Indictment, which might have been objected to as cauſe of Appeal. It would have been ſufficient had we only ſet out the purport of the Order: but we have done it *in haec verba.*

Serjeant. Jurors for the County at large are always mentioned to be *pro Corpore comitatus:* that Objection was taken 5 Mod. 203. 204.

1754.
REX
v.
BOYCE.

Norton. They are expreſſly mentioned in the Caption of the Indictment to be for the body of the County.

DENISON, J. Surely you would not have it mentioned in the body of the Indictment.

FOSTER, J. The Caption is part of the Indictment. It is only ſaid in the body — the Jurors preſent, and referred to the Caption for the reſt.

RYDER, Ch. J. It is clear as has been ſaid that an Indictment, nay even a Declaration not poſitively charging the neceſſary facts is bad; but if the diſobedience of the Order be (as Mr Norton ſays and it certainly is ſo) the offence complained of, it is ſufficiently charged. It ſets out the Order and charges a breach of it.

It is then a direct charge of all the Law ſays conſtitutes the Offence: but its objected it does not ſet out the previous ſteps. All this is unneceſſary: you admit a *taliter proceſſum* ſufficient. What occaſion was there for charging that this Rate was ſuch a one as bound the party. If it was not the party might have made it appear. Unleſs it appears on the Order to be otherwiſe, the Rate, is to be preſumed to bind the party. You can't ſay the Order is not ſet forth ſufficiently for its *in haec verba.* You might object to the validity of the Order if there were room enough for it, but you do not. In Actions on Judgments a *taliter proceſſum* is ſufficient.

As to the Objection that the Seſſions would not give Coſts, I have not looked into the Acts and therefore ſhould be fond of time, but I think

1754.
REX
v.
BOYCE.

there's nothing in the other Objections. There's no doubt but its an Indictable Offence.

WRIGHT, J. The Order is alledged and ſet out poſitively and not by way of Recital. That and the right of giving Coſts are the only Objections relied on. I think here is a ſufficient allegation of the Offence. In the Caſe mentioned, if the Conviction had been ſet out it would have been ſufficient: here is the Order which is, as Mr Norton ſays, the Judgment and that in a Caſe where the Juſtices have Juriſdiction, and therefore I think it ſufficient. Mr Norton ſays that in the Acts authorizing Juſtices to give Coſts, Juſtices of Liberties are expreſſly mentioned and I doubt not but it is ſo. If it be ſo, the Juſtices had power to give Coſts as much as in the Common Caſes and I think there's nothing in the Objection. Why is not the Offence Indictable? the Act being ſilent this is the only remedy.

DENISON, J. Its very clearly Indictable; were it not ſo there would be no remedy; for there is not one of thoſe Caſes where the Act of K. Wm. referred to by that of the preſent King has given a different remedy. With reſpect to the certainty of the Charge I think it very proper: had it been laid otherwiſe the proſecutor would have taken on himſelf to prove what was by no means neceſſary. Had he ſat out the manner of making the Rate, the Defendant's being liable to it &c. he muſt have proved it all: now only the Order need be proved. To ſay a Man or his Goods were taken by a certain Warrant, is to be ſure improper becauſe *non conſtat* what authority

1754.
REX
v.
BOYCE.

for ſuch Warrant. Had it been charged here that the Juſtices made ſuch an Order, without ſetting it out *in haec verba*, it would have been ſufficient.

FOSTER, J. Juſtices of Liberties as well as other Juſtices at their Seſſions had a right to determine matters of this Kind on Appeal; and I take it the Act enabling them to give Coſts extended to all Courts, that had before a right of judging on Appeal.

The Statute of King William gives a Juſtice authority to iſſue his Warrant for levying money in the Caſes mentioned in it, on a ſight of a Copy of the Order only, without the previous proceedings, and furniſhes a ſufficient anſwer to the objection here that thoſe proceedings are not ſet out.

RYDER, C. J. On looking into the Act 17 G. 2. I think it extends to Juſtices of Liberties though that of King William may not. It extends to all Juſtices named in this Act and thoſe are all Juſtices of Counties, Ridings, Diviſions, Corporations or Franchiſes. Surely thoſe words include Liberties, and the reference to the Statute of King William is not for a deſcription of the perſons who are to recover or who are to give Coſts; but for the manner in which they are to be recovered.

Judgment for the King.

IF there is a positive averment of disobedience of an order of a court of competent jurisdiction, an indictment is good without a direct allegation of that which is the foundation of

1754.
REX
v.
BOYCE.

such jurisdiction ; nor can the defendant otherwise avail himself, either at the trial or elsewhere, but by showing a want of jurisdiction in the court. Rex *v.* Mytton, 4 Doug. 333. s. c. 3 Esp. 200.

It is not necessary to set out the order according to its tenor; it is enough to set out the substance of it correctly.

Reg. *v.* Bidwell, 1 Den. C. C. 222.

The principal case contains a dictum of Foster, J., that "the caption is part of the indictment."

See, as confirming this, Reg. *v.* Turner, 2 M. & R. 214; Com. *v.* Edwards, 4 Gray (Mass.), 1.

In recent works on criminal law this is denied.

Arch. Cr. Pl. & Pr. (18th ed.) 38.
Bish. Cr. Proc., vol. i. s. 151.

1754.
REX
v.
JUSTICES OF SURREY.

Rex *verſ.* Juſtices of Surrey.

Mandamus will not lie to admit to Office one of ſeveral claimants until the right is ſettled between them. The Court will firſt try it on feigned Iſſues.

RULE to ſhew cauſe why a *Mandamus* ſhould not iſſue directing them to admit Mr Lawſon Clerk of the peace of that County.

Rules of the ſame kind were obtained on behalf of Mr Chetwode and of one Tarrant.

Mr. Norton, Appearing on behalf of the Juſtices, it appeared that each of theſe people had an Appointment to the Office from my Lord Onſlow Lord Licenser and Cuſtos Rotol. but objections were taken to each of the Appointments and it was doubtful which had the beſt right to the Office.

It was contended by Lloyd Solicitor General on behalf of C. and Hume on behalf of L. (T.

1754.

REX
v.
JUSTICES OF SURREY.

appears to have been ſworn) that all the *Mandamuſes* ought to go: that the Juſtices being in this reſpect only Miniſterial Officers ought to ſwear in each of them and then they might try the right between themſelves by bringing Actions againſt each other for their fees.

The Court thought the propereſt way of determining the right was on feigned iſſues, which was accordingly directed by Conſent, and the Rules enlarged till after the Trial.

THE general American doctrine is that the writ of *mandamus* will not issue unless the applicant has the complete and exclusive *prima facie* right to an office. A contested right must be tried by the writ of *quo warranto*. High, Ex. Rem. § 49.

The courts of Massachusetts and Maryland, however, hold that *mandamus* is an appropriate remedy.

Strong's *Case*, 20 Pick. 484.
Conlin *v.* Aldrich, 98 Mass. 557.
Harwood *v.* Marshall, 9 Md. 83.

1754.

REX
v.
GRIFFIN
DRISFIELD.

Rex *verſ.* Griffin Drisfield.

An Indictment will not lie for ſelling as a Buſhel of Coals a leſs quantity, if no falſe Meaſure is uſed.

INDICTMENT as for a Cheat, charged that Defendant wilfully, deceitfully and unlawfully ſold a Buſhel of Coals wanting a peck in due and lawful meaſure. Rule was obtained to Shew Cauſe why it ſhould not be quaſhed on the following Exceptions taken by Mr. Yates.

1ſt. That being an Indictment for a Cheat, without uſing falſe tokens it was not within the Statute. 2. That being laid *Contra formam Statuti*, if the Offence charged did not come within the Statute it could not be ſupported as an Indictment at Common Law.

For this he cited *Penhallow's Caſe* Cro. Eliz. 231. Indictment on the 5. E. 6. c. 4. for drawing a dagger in the Church againſt I. S. Exception that it was not laid to be done with an Intent to ſtrike him as the Statute requires.

It was attempted to be ſupported as an Indictment for an Aſſault at Common Law, but concluding *contra formam Statuti*, the Court held it could not be good as for an offence at Common Law. Leon. 188. s. c. & *Cholmley's Caſe*, Cro. Cha. 464. to the ſame purpoſe, and this is very reaſonable for every man is preſumed to come prepared with the particular defence only that is neceſſary to anſwer the Charge upon him, the price of the Coals does not appear as it ought; for if no more Money was paid than the Goods delivered were worth, there is no injury: and nothing material

1754.
REX v. GRIFFIN DRISFIELD.

ſhall be made good by Implication. 2 Hawk. 137. The *Queen* v. *Tucker*, 1 Ld. Raymd. 1. 4. Here is no poſitive Averment that the Coals when delivered wanted Meaſure. That alone is ſufficient to defeat the Indictment becauſe that is wanting which conſtitutes the Offence. It does not appear that the deficiency in Meaſure was wanting at the time of the Sale and unleſs it were ſo, there was no fraud.

5. It does not appear that the Defendant knew the Deficiency. It is charged that he wilfully, deceitfully & unlawfully ſold the Coals wanting meaſure. But the Words wilfully &c. relate only to the Fact of Selling & not the intention.

Mr. Caldecott *s.c.* cited as Inſtances of Indictment for Cheats Generally (without falſe tokens) at the Common Law, the *King* v. *Wilcox* Tremayne's Ent. 91. the *King* v. *Chamberlayne* ib. 105. *R.* v. *Romney* ib. 106. and many other precedents in the ſame Book. 1. Sid. 409. *R.* v. *Burgoyne* Indictment for ſelling Ale in black pots unſealed *contra pacem.* Exception that it was not laid *Contra formam Statuti*, but the Court thought ſelling by unlawful Meaſures an Offence at Common Law and overruled the Exception. 2. That notwithſtanding the words *contra formam Statuti* it was maintainable as an Indictment at Common Law, that this was well settled. 2. Hawk. 211. 3. As to the prices, that its neceſſary to ſhew the value in Indictments for no other purpoſe than to diſtinguiſh between grand and petty larceny, where that is the queſtion & cited 2. Hawk. 234. That the want of

1754.
REX v. GRIFFIN DRISFIELD.

due Meaſure was ſufficiently alledged and the word knowingly was not neceſſary: & referred to 1. Ro. 85. & Trem. 85 &c. He urged further that the Court will not quaſh Indictments for Cheats, for which he cited 6 Mod 42. *R.* v. *Orbell* where the Court ſaid they would not quaſh an Indictment for a Cheat: but the party might demur to it if he pleaſed.

Yates *contra*, inſiſted that Indictments for Cheats were often quaſhed & inſtanced the *Queen* v. *Jones*, 1. Salk. 379 & the *King* v. *Combrun* lately.

RYDER, C. J. We are all Clear that this Indictment can't be ſupported on the Merits. It will be unneceſſary to take any Notice of the other Objections.

This is not an Indictable offence. Its only ſelling a certain quantity and afterwards not delivering that quantity, which is only a breach of Contract for which there's another remedy. It may in ſome ſenſe be called a Cheat: but its a fraud ariſing from not performing a Contract. The Caſes in Tremayne are only entries and not authorities, the ſenſe of the Court does not appear.

WRIGHT, J. *R.* v. *Heath* was quaſhed for the ſame Reaſon. That was an Indictment for ſelling 17 Gallons of Geneva for 19.

FOSTER, J. This is not an Indictment for ſelling by a falſe Meaſure. That's Indictable.

DENISON, J. Its nothing more than an Action on the Caſe turned into an Indictment.

Rule abſolute.

THE principle on which this case is decided is, that an indictment will not lie for a civil or private injury.

Rex *v.* Storr, 3 Burr. 1698.

As pulling off the thatch of a man's dwelling-house.

Rex *v.* Atkins, 3 Burr. 1706.

It is not a cheat at common law, knowingly exposing to sale and selling under the sterling alloy, as and for gold of the true standard weight. Rex *v.* Bower, Cowp. 323.

Or if one sell, though to many persons, a less quantity than is pretended. Rex *v.* Dunnage, 2 Burr. 1130.
Rex *v.* Osborn, 3 Burr. 1697.
Rex *v.* Young, 3 T. R. 104.
Reg. *v.* Eagleton, Dears. C. C. 376, 515.

The offence must be one which affects the public and is calculated for the purposes of general fraud and deceit, and against which common prudence cannot guard.

Rex *v.* Wheatly, 2 Burr. 1125.

But if one cheat another of his property by false affirmations merely, and without using any false weights, measures, or tokens, and by no conspiracy, it is not indictable.

Russell on Crimes, vol. ii. B. iv. c. 23, p. 610.
Com. *v.* Warren, 6 Mass. 72.
Reg. *v.* Hannon, 6 Mod. 311.

1754.

REX
v.
THE JUSTICES
OF
MIDDLESEX.

Rex *verſ.* the Juſtices of Middleſex.

Where Overſeers are appointed for each Diviſion of a pariſh under the Act of 13 & 14. Car. 2. c. 12. it muſt appear, (1) that they are diſtinct Townſhips and (2) that the Poor of the pariſh cannot otherwiſe reap the benefit of the St. 43 Eliz.

The Act of 13 & 14 Car. 2. c. 2 is not a general Act but extends only to the Counties named and to Extra parochial places.

STANYFORD moved laſt Term for a *Mandamus* to appoint Overſeers of the Poor for Kentiſh Town being the North Diviſion of the pariſh of Pancras on Affidavit that there have been uſually diſtrict Overſeers choſen for the ſeveral Diviſions, that thoſe Overſeers account ſeparately with the Juſtices for the Money they raiſe from their ſeparate Diviſions, that there is one Common Workhouſe the poor of which are maintained, by Agreement, between the two Diviſions, alternately, each a Month in turn. That the ſurplus of the Money raiſed by the Overſeer of one Diviſion is paid over to his Succeſſor and not to the other Overſeer unleſs there be a deficiency on his ſide. *Rule &c.*

Pratt *s.c.* This is a rule to divide a pariſh which has been united ever ſince the 43 Eliz., at the requeſt of one part of the pariſh only, directly contrary to the inclinations of the other part. It would be extraordinary to deſire this unleſs your Lordſhips are compelled to do it under form of Law. I ſhall 1st. therefore ſee how the Law ſtands. When the 43. Eliz. was making, the Legiſlature found the ſeveral pariſhes and Diſtricts divided to their hands: and they obliged every of thoſe Diſtricts or Pariſhes, great or ſmall thenceforth to maintain its own poor by an equal contribution among its Inhabitants.

This Diviſion could never be ſtrictly equal

becauſe the Poor will be more or leſs in Diſtricts of equal extent as it may happen; but the Legiſlature having made this general regulation, let one Diſtrict be ever ſo large and its Poor ever ſo few; let another be ever ſo ſmall and its Poor ever ſo many; ſuch was the Law; and ſo it continued. But the inconvenience that in ſome places pariſhes were of ſo large Extent that the Overſeers could not with any propriety inſpect the management of the poor throughout on account of the diſtance — this and this only produced the 13 & 14 Car. 2. c. 12. by the 21ſt Section whereof reciting that the Inhabitants of Lancaſhire &c. &c. and many other Counties in England and Wales by reaſon of the largeneſs of the Pariſhes within the ſame have not the benefit of 43 Eliz. its enacted that the poor within every Townſhip or Village within the ſeveral Counties aforeſaid ſhall henceforth be provided for within their reſpective Townſhip or Village wherein they inhabit or are ſettled; and that there ſhall be choſen yearly according to the Statute of 43 Eliz. 2 or more Overſeers within every of the ſaid Towns or Villages with the like powers and ſubject to the like penalties for non performance as limited by that Act. The inaccuracy of this Clauſe occaſioned ſeveral Doubts. 1ſt. Whether it was confined to the ſeveral Counties named in it; but it was determined to be a general Act, and to extend to the whole Kingdom. 2. Whether it be a general Law to divide every pariſh in the Kingdom that has more than one Townſhip or Vill in it. If your Lordſhips ſhould conſtrue

1754.
REX
v.
THE JUSTICES
OF
MIDDLESEX.

this Law with that Latitude the conſequence will be that that rule of proportion hitherto obſerved throughout the Kingdom will be ſubverted, becauſe then every Townſhip will be burthened with its own Poor without the aid of the reſt of the pariſh who have more property & leſs Poor: But this Law was introduced for the benefit of thoſe Townſhips where they could not otherwiſe reap the benefit of 43 Eliz. In the *Queen* v. *Inhabitants of Dolting* T. 11 An. Stra. 512. 1004. 1071. the Court determined that extra parochial places were within this Act, and conſequently that ſince this Act Overſeers of the Poor might be appointed for them. *Stokelane* v. *Dolting* s. c. Salk. 486.

There is a ſingle Caſe in Viner tit. Overſeers 421 (I would not cite it on ſuch authority but its a Manuſcript caſe reported no where elſe) that the Court ought to tie up their conſtruction of this Clauſe within the deſcription of the preamble. Pariſhes to be the Object of this Act ought to be of large Extent and not capable of reaping the benefit of the 43 Eliz. without Diviſion. This ſeems a reaſonable conſtruction; if the contrary was the Caſe and every Town might be ſeparated from the Pariſh at large, it would lay ſuch a Burthen on many towns as would be equal to the whole rents of the Houſes, perhaps the whole value of them.

To this day there has never been anything of this ſort attempted, not a ſingle inſtance in caſes which did not come directly within the deſcription of the Preamble.

It remains then to be conſidered how far this diſtrict of Kentiſh Town comes within that deſcription to intitle them to a ſeparation. For that purpoſe they have thrown together a collection of facts to ſhew that the pariſh is already in ſome reſpects divided. That there has been one Overſeer for the South, another for the North Diviſion who have collected the rates for their ſeveral Diviſions, that the Common Workhouſe is maintained alternately by the ſeveral Diviſions. By all this they would inſinuate as if there had been in fact ſuch a Diviſion. There is but one material fact wanting to ſhew it, that is, their Expences had not been common but ſeparate and diſtinct. On the contrary there appears on their Affidavits one ſtrong fact which can't be got over and that is that if at the end of the Year there appears a ſurplus on one ſide and a deficiency on the other, the ſurplus is paid to the other Overſeer to make good the deficiency. It will appear on our Affidavits that both the Overſeers are choſen by the whole pariſh at a General Meeting, though for the ſake of convenience they are uſually choſen each from the diſtrict he is to take care of: One entire rate is made for the whole, though they collect each from his own Neighborhood. The diſtrict now deſiring to be divided is by much the richeſt and has the feweſt poor; the poor of the other diſtrict lying near St. Giles's in the fields are 2 thirds of the whole Number. Should this Application receive the leaſt countenance 1000 of the ſame ſort would follow it.

Hume Campbell *contra*. That Kentiſh Town

1754.
REX
v.
THE JUSTICES OF MIDDLESEX.

is a Village is unqueſtioned. It ſeems to be admitted that there has been a kind of Diviſion.

The collection has been ſeparate, the rate may be ſo or may not. Till the *Mandamus* is granted we have no acceſs to the rate & therefore can know nothing of it. They concur only in the Workhouſe which 2 diſtinct Pariſhes may do. The Great conſequence of the Queſtion is a reaſon why it ſhould not be determined on Affidavits, but the *Mandamus* ought to go, and then the right may be properly determined.

Stanyford *s.s.* I ſubmit it we are intitled to the *Mandamus*, *ex debito juſtitiae*. It has been ſaid that there are two requiſites to bring this Caſe within the Stat. Car. 2. one that the Pariſh be ſo large that it can't receive the benefits of 43. Eliz. the other that there be diſtinct Vills in it. As to the ſize it appears to be 5 miles long, which in this part of the kingdom is very large; the Diviſions, ſeparate Collections &c. ſhew the convenience and expediency of it. That they are diſtinct vills will not be denied: We do not contend but that both are in one pariſh. As to the having a Work houſe in Common, by the 9. G. 2. Pariſhes Towns or Vills may agree 12 or more together to have one Work houſe. If the *Mandamus* be denied we have no remedy: if it be granted it determines nothing.

Let them return this matter and then they will be liable to an Information if falſe. Had there been no Evidence of a Diviſion the St. Car. 2. is ſo expreſs that I ſhould ſubmit we are intitled to it. It directs that all and every the Poor within

1754.
REX
v.
THE JUSTICES
OF
MIDDLESEX.

any Townſhip or Vill ſhall be maintained by ſuch Townſhip or Vill, and that there ſhall be yearly choſen or appointed Overſeers for thoſe Townſhips or Vills who are to have the ſame power with thoſe under 43 Eliz.

RYDER, C. J. I have very little doubt or difficulty on the queſtions that have been made on this Occaſion. They are 3. 1ſt. Whether a *Mandamus* is in effect a Writ of right. 2. What are the Terms required by the Stat. Car. 2. neceſſary to intitle the perſons applying. 3. Whether this Caſe comes within thoſe Terms. 1ſt. Suppoſing the Terms were complyed with, it is a matter of right for the Act poſitively directs what ſhall be done in the Caſe there put. The queſtion is whether this be that Caſe for the Act does not direct this ſhall be done on any Application. If this be one of the Caſes the Act meant to provide for, as the Overſeers can only be appointed by the Juſtices, and the Juſtices can't be compelled but by *Mandamus*, the *Mandamus* ought to go. Nay further if it were doubtful, the Court would do right to grant it, that the Queſtion might be properly determined. Is it then doubtful or no? that depends on the 2nd Queſtion, what are the Terms required by the Statute. That the Pariſh ſhould be large ſeems a principal ground of the Proviſion. 'Tis not the Number of Poor only, but the Extent of the Ground which renders it impracticable for the Officer to attend perſonally. Largeneſs alone is not ſufficient but it will be neceſſary to ſhew that they have not and cannot reap the benefit of the 43 Eliz.

1754.
REX
v.
THE JUSTICES
OF
MIDDLESEX.

by means of it. Next it muſt be a Townſhip or Vill (and they are the ſame) for which you can have ſeparate Overſeers. 3d. does this Caſe fall within thoſe Terms? 1ſt. As to largeneſs, conſidering the ſituation & Number of Inhabitants I do not think it a large pariſh. 2nd. In the next place, is it a pariſh that has not and cannot receive the benefit of 43. Eliz. Its clear they have had; its clear they may continue to have the benefit of that Statute. No *Mandamus* for this purpoſe has been ever applied for before and yet the Poor have hitherto for ſo many years been maintained. What room then is there for the Court to interpoſe to compel the Juſtices to do what is done already. But its objected that their having had the benefit of the Statute of Elizabeth ariſes from their doing that of themſelves which the Act of Car. 2. was intended to eſtabliſh.

That does not ſufficiently appear. They have not conſidered themſelves as ſeparate pariſhes though in the choice of Officers and the diſtribution of the Office they have acted as the ſize of their pariſh makes moſt convenient. Its unneceſſary they ſhould all attend the Collection of Rates: notwithſtanding therefore the ſeparate collections they are all Officers of one pariſh. The great point is this, thoſe who would throw off the burden, would make the Caſe worſe than it is at preſent; for there muſt be Officers appointed for each diſtrict however unequal &c.

3. This brings me to the laſt point. It is not ſworn that theſe two ſeparate diviſions are ſeparate Vills, nor could it I believe becauſe Kent-

iſh Town appears to be one of thoſe arbitrary Diviſions. On the whole I think this a Caſe neither within the words or meaning of the Act; and it would introduce great inconvenience at this time to make this ſeparation.

WRIGHT, J. Relied on it that the pariſh had never been divided in the manner propoſed and that part of it for which ſeparate Overſeers are deſired is not a ſeparate Vill, though Kentiſh Town is ſo, that being only a part of the intended Diviſion.

DENISON, J. This is an application of a ſingular nature and wholly unprecedented. Its founded on a particular Statute. Whoever applys to have the benefit of that Statute muſt ſhew its wanted for the ſake of Juſtice; now all they have diſcloſed ſhews it to be unneceſſary. Moſt clearly and manifeſtly they can do without it as they have done by an exceeding proper Method. To intitle themſelves to this *Mandamus* they ſhould have ſhewn that they could not have the benefit of 43 Eliz. without it. As to their being without remedy, they have ſhewn no right.

FOSTER, J. I can't imagine they intended to found this Application on the St. Car. 2. for they have not brought their Caſe in any ſhape within that Act. The foundation they went on when they applied for the rule and what I thought the Court went on in granting it, was that thoſe diviſions were diſtinct pariſhes in effect; that fact is clearly denied and one part of their own Affidavit, which mentions the applying the ſurplus of

1754.

REX
v.
THE JUSTICES
OF
MIDDLESEX.

one ſide, to make good deficiencies on the other ſhews it to be otherwiſe.

It has been ſaid that this is a general Act and extends throughout the Kingdom as well as in the Counties mentioned in it: the Court has never conſidered it ſo far as I know of, except in the Caſe of extra parochial places and thoſe the Court thought were otherwiſe totally without remedy. But I don't know the Court has ever determined that it was to be carried into other Counties than thoſe named in the Act, unleſs in Extra parochial places.

Rule diſcharged.

By stat. 43 Eliz. c. 2, a parish was the only district bound to the separate maintenance of its poor. But by stat. 13 & 14 Car. 2, c. 12, s. 21, townships and villages are also brought within the same system. See Rex *v.* Horton, 1 T. R. 374.

An appointment of two justices may be removed into the High Court of Justice, Queen's Bench Division, by *certiorari*; and the court will go into the question upon affidavit, whether the place for which the appointment is made be a township or village; and if it is not, will quash the appointment.

Rex *v.* Standard Hill, 4 M. & S. 378.
Rex *v.* Forrest, 3 T. R. 38.
Rex *v.* Great Marlow, 2 East, 244.

Where separate overseers are appointed for each township of a parish, a settlement previously gained in the parish is destroyed. The Act of 28 & 29 Vict. c. 79, does not apply to such a parish.

Stourbridge Union *v.* Droitwich Union, 6 Q. B. 769.

Michaelmas Term.

28 Geo. 2.

1754.

REX
v.
DAVIS.

Rex *verſ.* Davis.

INDICTMENT againſt Defendant as Overſeer of the Poor of the Pariſh of Saint Peter ad vincula or the Liberty of the Tower of London for refuſing to receive a pauper adjudged to be ſettled there and brought him under an Order for that purpoſe from two Juſtices. Defendant being found Guilty,

An Indictment lies under St. 13 & 14 Car. 2. againſt a Miniſterial Officer for refuſal to obey an Order of Juſtices for the removal of a pauper from a Pariſh. The Act of 3 & 4. W. & M. providing a different remedy relates to Cities and towns Corporate; but if extended to Pariſhes would not take away the remedy by Indictment.

Lloyd (Solicitor General) Moved in Arreſt of Judgment and urged that this was not an Indictable Offence, the Statute of 3 & 4 W. & M. c. 11. creating the Offence, having ſubjected the Offender to a penalty of 5 l. to be recovered as there directed. That diſobedience of a Statute is not indictable, where the Statute has provided another remedy for which he cited 4 Mod. 144. 1. Salk. 43. 2 Ld. Raymd. 991 &c.

Rule to ſhew Cauſe.

Norton, *ſhewing cauſe.* I underſtand the Ob jection to be that this is not an indictable Offence becauſe the Statute of King William has provided another remedy. I admit that where a new Offence is created and a penalty provided you muſt purſue the Remedy chalked out by the

1754.
REX v. DAVIS.

Statute creating the Offence. Admitting this principle I admit every caſe that was cited. But I ſhall contend that this does not fall within that principle.

1ſt. for that it was not a new Offence made ſo by the 3d & 4th K. Wm. It was always an Offence for miniſterial Officers to diſobey their Superiors and an Indictment was the proper way of puniſhing it. It was not a new Offence for the 13th & 14th Car. 2. enacts that Juſtices ſhall remove Paupers. When they had made an Order for that purpoſe how were they to inforce it, but by Indictment. Indictment is the Common remedy in caſe of diſobedience to Orders.

2nd. Suppoſe it a new created Offence, here is another remedy. This Statute of the 3 & 4 K. Wm. (like that of 8 & 9 K. Wm. and the 17. G. 2 reſpecting the record of Coſts) has only given a remedy where the party lives out of the Juſtices' Juriſdiction. This was determined lately in one of thoſe Actions in the *King* v. *Boyce* not to take away the Indictment where the party was not out of their Juriſdiction.

The reaſon for giving a particular remedy only in caſe the party lived out of their Juriſdiction was plainly that if the party lived within their Juriſdiction they might proceed in the common way by Indictment.

It then becomes a queſtion whether the Court will not intend the Liberty of the Tower of London to be within the City of London. The Indictment ſtates that he was Overſeer of a particular diſtrict, viz. the Liberty of the Tower of

1754.
REX
v.
DAVIS.

London. Now unleſs the Court intends that this was out of the City of London it falls clearly within the *King* v. *Boyce:* for if the Juriſdiction extends to the Tower, the Indictment is right; the extra remedy being given only in Caſes where the party lives out of the Juriſdiction.

Will it be a foreign Intendment to preſume the Liberty of the Tower of London within the City of London, after a verdict too, by which the Defendant has been found Guilty.

Lloyd (Solicitor General) *contra.* I find we agree in the principle, the only queſtion is whether the Caſe comes within it. Mr Norton ſays truly there was a former law 13 & 14 Car. 2. whereby Juſtices were authorized to remove paupers, but he cannot ſhew me any Clauſe in that or any other Act by which the Officer is commanded to receive them. If there had been ſuch a one there would be no Occaſion for this Act of King William for they might have compelled him by Indictment. Yet this Act was thought neceſſary to be made requiring the Officers to receive and if they do not to forfeit 5 l. to the Poor. The *King* v. *Boyce* turned on this principle, that the power of diſtraining given the Juſtices by that Act was only where the party lived in another County, where the Juſtices had none before. The Words of the 3rd & 4th of K. Wm. if any Words can do it, firſt make this an Offence and directs how it is to be puniſhed.

Hume *inter alios.* Its impoſſible to create a new Offence, the Common Law is a ſyſtem applicable to every Tort.

1754.
REX
v.
DAVIS.

DENISON, J. There ſeems to be but one point in this matter, the general principle cannot be diſputed where a penalty is provided in a Caſe not puniſhable before and a particular method of recovering it created, it is not indictable. *Caſtle's Caſe* Cro. Jac.

But another thing is ſaid, that where a Penalty is provided yet if there be beſides a general Prohibition the Party may be Indicted on the prohibitory Clauſe. And where one Act orders a thing to be done or prohibits it & another provides a remedy, the party has his Election to indict on the firſt or purſue the remedy provided by the Latter.

The queſtion here is whether or no this was an Offence before the 3. & 4. W. & M. whereby a Penalty of 5 l. is given to be recovered on Conviction &c. Or, in other words, Whether if this Act had not been made, this Indictment would have been good on the Stat. Car. 2. and I own I think it would — for can it be doubted but that if a Miniſterial Officer will not obey an Order of a perſon to whom the Statute gives a power of making it, he ought to be Indicted. What elſe could be done before the Statute of William & Mary. Nay what elſe can be done now, for that Act ſeems to me to relate only to certain inſtances mentioned in it of Removals from one City, Town Corporate &c. to another and makes no proviſion when they are conveyed from one Pariſh to another. But ſuppoſing this laſt point to be otherwiſe I think the party indictable under the Stat. Car. 2. whatever becomes of the queſtion on the latter Statute.

1754.

REX v. DAVIS.

FOSTER, J. Wherever a Juſtice is authorized to make an Order I take it the Officer is indictable if he refuſes Obedience to it. If ſo the latter Act does not take away the Old remedy of Indictment. That ſtands as it did. Beſides the latter Act as has been obſerved does provide only for removals from one City &c. to another and not from one pariſh to another, within the ſame City. But be this as it may, what could be done on the Stat. Car. 2. before this latter Act was made, if the Defendant were not indictable.

Solicitor General. The Order is undoubtedly binding on the perſon, to whom its directed to carry.

FOSTER, J. And equally ſo on the other to receive.

Rule diſcharged.

AN officer neglecting or abusing the duties of his office is guilty of an indictable offence. Reg. *v.* Wyat, 1 Salk. 380.

Thus an overseer for not providing for the poor.
Rex *v.* Meredith, R. & R. 46.

For refusing to account. Rex *v.* Commings, 5 Mod. 179.

Or for disobeying any other order of justices where they have competent jurisdiction. Rex *v.* Hollis, 2 Stark. 536.

So a constable for not making hue and cry.
Crowther's Case, Cro. Eliz. 654.

If a statute prohibit a matter of public grievance, or command a matter of public convenience (such as the repairing of public highways or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding.
Rex *v.* Sainsbury, 4 T. R. 451.
Rex *v.* Price, 11 A. & E. 727.

1754.
REX
v.
DAVIS.

When the matter is an indictable offence at common law, and a statute specify a mode of proceeding different from that by indictment, the prosecutor has the option of proceeding by indictment. Rex *v.* Robinson, 2 Burr. 799. Rex *v.* Carlile, 3 B. & Ald. 161.

Rex *verſ.* Mary Hunt.

1754.
REX
v.
MARY HUNT.

The Court will not quaſh an Indictment for making a diſturbance at the door of a Houſe.

CLAYTON moved to quaſh an Indictment which charged that Defendant entered the Houſe of one Joſeph Lodge & in at and before the ſaid Houſe made a great noiſe, by means whereof his wife was frightened and miſcarried. It was removed from the Quarter Seſſions of the City of London. Exception — Its no more than a common action of Treſpaſs. There was a Caſe on Mr. Hume's Motion where an Indictment charged a perſon with entering a Cloſe of Land with ſpades pickaxes &c. & the Court quaſhed it, thinking it no more than a Common Treſpaſs.

DENISON, J. Have you any Caſe where the Court has quaſhed an Indictment for a diſturbance in a Houſe. This ſeems to me a great Offence, and a Man may be as much diſturbed by Knocking at his Door as in the Houſe. It is not a bare Treſpaſs, but a perſonal wrong. I think the Court can't quaſh it.

Motion denied.

Vide R. v. *Nicholls.*

IN Com. *v.* Taylor, 5 Binn. (Penn.) 277, the charge was for breaking into a house and frightening a pregnant woman. The reasoning of the court, Tilghman, C. J., is as follows: "Supposing the indictment not to be good for a forcible entry, may it not be supported on other grounds? I do not find any precise line by which indictments for malicious mischief are separated from actions of trespass. There is another principle, however, upon which it appears to me the indictment may be supported, namely, acts injurious to private persons, which tend to excite violent resentment." Rex *v.* Hood, Say. 161 (Rex *v.* Hunt, s. c.), was referred to.

Whart. Prec. Indict. 485, n., 868.

Discharging a gun unnecessarily, within hearing of a person known to be ill, and who is seriously affected by the noise, is within this class of cases. Com. *v.* Wing, 9 Pick. (Mass.) 1.

So any trespass accompanied by disturbance of the peace.

Henderson's Case, 8 Gratt. (Va.) 708.

State *v.* Langford, 3 Hawks (N. C.), 381.

INDEX.

MOTION TO QUASH.

OVERSEER.

(See PARISH.)

PARISH.

Where overseers are appointed for each division of a parish under the Act of 13 & 14 Car. 2. c. 12, it must appear (1) that they are distinct townships; and (2) that the poor of the parish cannot otherwise reap the benefit of the St. 43 Eliz. The Act of 13 & 14 Car. 2. c. 12, is not a general act, but extends only to the counties named, and to extra-parochial places. Rex *v.* Justices of Middlesex, 46.

PAUPER.

(See JUSTICES' ORDER.)

SESSIONS.

(See KING'S COURTS.)

STATUTE.

(See CERTIORARI; KING'S COURTS; PARISH; VENUE.)

VENUE.

The venue of an offence is well laid in the parish, though it contain two or more vills; but under the Statute of Additions the defendant should be described of the vill or hamlet. Rex *v.* Blower, 7.

WARRANT.

(See COMMITMENT.)

lac